

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

PIONEER BANK,
PIONEER BANCORP, INC. and
CLOUD PAYROLL, LLC,

Defendants.

CASE NO. 1:20-CV-487[DNH/DJS]

No.

COMPLAINT

The United States of America, at the direction of a delegate of the Attorney General and with the authorization of a delegate of the Secretary of the Treasury, pursuant to 26 U.S.C. § 7401, brings this civil action to: (1) obtain an accounting of all payroll tax deposits received by Pioneer Bancorp, Inc., and/or Pioneer Bank in a certain tax settlement account or accounts between August 27, 2019 and September 9, 2019, (2) recover all trust fund taxes in such tax settlement account(s) that were not paid over to the United States, and (3) turn over to the United States the non-trust fund payroll taxes in such tax settlement account(s) that were not paid over to the United States. In support of its complaint, the United States alleges as follows:

JURISDICTION AND PARTIES

1. The district court has jurisdiction pursuant to 26 U.S.C. § 7402(a), and 28 U.S.C. §§ 1331, 1340, and 1345.
2. Defendant Pioneer Bank, is a bank doing business in Albany, New York, within the jurisdiction of this Court.

3. Defendant Pioneer Bancorp, Inc. is a bank incorporated in Maryland, with a principal place of business in Albany, New York, within the jurisdiction of this Court.

4. Defendant Cloud Payroll, LLC (“Cloud”) is a Delaware limited liability company with its principal place of business in Clifton Park, New York, within the jurisdiction of this Court.

PAYROLL TAXES

5. At the time an employer pays wages, the employer must deduct and pay over to the United States a portion of those wages in respect of federal taxes imposed on the employees, and also must pay the employer’s share of federal taxes related to the payment of wages; together, the employees’ and employer’s taxes are commonly referred to as “payroll taxes.” 26 U.S.C. §§ 3102, 3402. These taxes include employees’ income tax withholdings; the Federal Insurance Contributions Act (FICA) (Social Security), imposed partly on the employer and partly on the employee; Medicare tax, also imposed partly on the employer and partly on the employee; and the Federal Unemployment Tax Act (FUTA) (imposed solely on the employer). Payroll taxes (excluding FUTA taxes) must be paid over to the United States Treasury as federal tax deposits within a short time of when wages are paid, and any shortfall must be paid with a quarterly employment tax return (reported on Form 941). FUTA taxes are paid annually (reported on Form 940).

6. When a person is required to withhold a tax from wages paid to an employee and pay over the amount withheld to the United States, the amount of the tax withheld is held in trust for the benefit of the United States until it is paid over. 26 U.S.C. § 7501. This trust applies to income tax withholding and the employees’ portions of FICA and Medicare tax (“trust fund

taxes”). The employer’s portions of FICA and Medicare tax and FUTA taxes are not subject to the imposition of the trust.

7. When net wages are paid without paying over the trust fund taxes, the trust is imposed on the withheld funds.

THE MONEY AT ISSUE

8. Michael T. Mann (“Mann”) operated numerous businesses, including Cloud.

9. The businesses operated by Mann, including Cloud, provided tax collection and payment services, including payment of payroll taxes, for numerous companies throughout the United States.

10. To provide these payroll services to its customers, Cloud had a tax settlement account at defendant Pioneer Bank with an account number ending in 4220 (the “Pioneer tax settlement account.”).

11. The Pioneer tax settlement account was used to hold payroll taxes that had been withdrawn from employer accounts by payroll servicing companies until such funds were paid to state and local taxing authorities and the Internal Revenue Service (“IRS”).

12. Southwestern Payroll Service Inc. (“Southwestern Payroll”) is an Oklahoma payroll support company that contracts with numerous employers to provide payroll processing services, including providing payroll checks to its clients’ employees, and collecting, processing, and remitting the clients’ payroll taxes to the appropriate taxing authorities in an accurate and timely fashion.

13. On or about April 21, 2017, Mann, through Cloud, purchased 51% of the outstanding stock of Southwestern Payroll.

14. On information and belief, Pioneer Bank provided the financing for Cloud's purchase of the majority interest in Southwestern Payroll.

15. On information and belief, when Southwestern Payroll processed an employer's payroll, Southwestern Payroll withdrew the payroll taxes, including trust fund taxes owed to the IRS, from the employer's accounts and placed those funds in an account controlled by Southwestern Payroll at Prosperity Bank in Tulsa, Oklahoma. From there, National Payment Corporation ("NatPay"), an ACH servicer that contracted with multiple payroll companies (including Southwestern Payroll), would transfer the payroll taxes first to an account at First Premier Bank in Sioux Falls, South Dakota, and then to the Pioneer tax settlement account. The funds would be held in the Pioneer tax settlement account until Cloud provided instructions to NatPay, which would transfer the payroll taxes from that account to First Premier, then to the appropriate state and federal taxing authorities.

16. On information and belief, NatPay transferred funds to the Pioneer tax settlement account for payrolls processed by other payroll-service companies, in addition to Southwestern Payroll.

17. On information and belief, at some point on or prior to August 30, 2019, Pioneer believed Mann to be in default of a \$42 million revolving line of credit it had extended to Mann on August 12, 2019, as collateral for which Mann had pledged bank accounts, including the Pioneer tax settlement account.

18. On information and belief, on September 11, 2019, Pioneer sent a default notice to Mann and/or his affiliated companies, demanding payment on the revolving line of credit.

19. On information and belief, beginning on or about August 30, 2019, Pioneer froze outgoing transactions from the Pioneer tax settlement account, but continued to receive deposits

of payroll taxes made by NatPay to that account until September 4, 2019. On and/or after August 30, 2019, Pioneer seized funds in Mann's accounts, including the funds in the Pioneer tax settlement account, to apply towards debts allegedly owed to Pioneer by Mann.

20. On information and belief, the amounts seized by Pioneer include \$7,270,458.70 representing payroll taxes transferred from Southwestern Payroll on behalf of 842 employers that were intended to be paid to the IRS. A portion of that \$7,270,458.79 represents the trust fund taxes that are held in trust for the United States.

21. Upon information and belief, the employees from whose wages the trust fund taxes set forth in Paragraph 19, above, were withheld were paid net wages and, as such, the portion of the \$7,270,458.70 that constituted trust funds within the meaning of 26 U.S.C. § 7501 is properly the property of the United States.

22. On information and belief, the funds seized by Pioneer included at least \$6,602,162.56 in payroll taxes transferred to it by NatPay on behalf of payroll processing companies other than Southwestern Payroll. However, it is unknown at this time whether the wages associated with those payroll taxes were paid and, of that amount, what portion constituted trust funds.

23. As a result of Pioneer's actions in seizing the payroll tax deposits from the Pioneer tax settlement account, the employers who made good-faith contractual arrangements to provide for the timely payment of payroll taxes remain liable to the United States to the extent of the unpaid taxes.

Count I: Accounting (Against Cloud Payroll)

24. The United States incorporates the allegations in Paragraphs 8 through 23 as if they were restated herein.

25. As set forth above, Cloud Payroll was responsible for determining what payroll taxes deposited into the Pioneer tax settlement account were payable to the IRS and transmitting that information to NatPay.

26. The United States requests that the Court order Cloud Payroll to provide an accounting of the funds seized by Pioneer from the Pioneer tax settlement account, specifically delineating, by employer, the amount of wages intended to be paid and the amount of payroll taxes that were intended to be paid to the IRS, which will allow the IRS to determine whether net wages were paid and, thus, the amount of the funds seized by Pioneer which constituted trust funds within the meaning of 26 U.S.C. § 7501.

Count II: Return of Trust Fund Taxes (Against Pioneer Bank and Pioneer Bancorp)

27. The United States incorporates the allegations in Paragraphs 8 through 26 as if restated herein.

28. The trust funds paid by the employers, and transmitted from the payroll servicing companies, including but not limited to Southwestern Payroll, to the Pioneer tax settlement account were not Michael Mann's property, and he lacked the authority to pledge such funds as collateral for any loans or lines of credit extended to him by Pioneer.

29. Pioneer Bank and/or Pioneer Bancorp wrongfully seized funds that were subject to the statutory trust imposed by 26 U.S.C. § 7501 in favor of the United States, including but not limited to the \$7,270,458.70 transferred to it by NatPay from Southwestern Payroll.

30. Pioneer Bank and/or Pioneer Bancorp owe the United States the sum of all trust funds they received, together with statutory interest computed from the date on which the payments should have been transmitted to the IRS.

31. To the extent that any employers subsequently paid net wages (or had net wages paid on their behalf) and then timely paid the trust fund taxes associated with those wages to the IRS, the United States is not seeking to recover those amounts from Pioneer (though the employer may have a cause of action against Pioneer in its own name).¹

Count III: Return of Non-Trust Fund Taxes (Against Pioneer Bank and Pioneer Bancorp)

32. The United States incorporates the allegations in Paragraphs 8 through 31 as if restated herein.

33. The purpose of the contracts between the payroll companies (including, but not limited to, Southwestern Payroll) and the employers that contracted with them was to ensure timely payment of payroll taxes to taxing authorities, including the IRS.

34. The purpose of the contract between the payroll companies (including, but not limited to, Southwestern Payroll) and Cloud Payroll was to ensure timely payment of payroll taxes to taxing authorities, including the IRS.

35. Given that the intent of the contracts was to pay the payroll taxes to the IRS, and not for Michael Mann or any of his related entities to use the funds for any purposes, the funds were never property of Mann's to pledge as collateral for any agreement between him (or any of his related entities) and Pioneer. At the time that Pioneer seized the funds, such funds were the property either of the IRS or of the individual employers whose taxes the funds were meant to pay.

¹ The United States reserves its rights to seek to collect unpaid employment taxes from any person or entity it determines was responsible for paying over trust fund taxes and willfully failed to do so.

36. On information and belief, at the time it seized the funds, Pioneer knew or was on notice that the funds it seized from the Pioneer tax settlement account were tax payments intended for taxing authorities, including the IRS.

37. The IRS, as an intended third-party beneficiary of the contracts between the employers and the payroll companies, and of the contracts between the payroll companies and Cloud Payroll, is entitled to enforce the contracts and have Pioneer turn over the non-trust fund portion of payroll taxes to the IRS (in addition to the trust fund portion of the payroll taxes, as set forth in Count II, above).

WHEREFORE, the plaintiff United States of America requests the following relief:

A. The Court enter judgment in favor of plaintiff United States of America and against defendant Cloud Payroll, LLC, ordering Cloud Payroll to provide an accounting of funds it received as a result of transfers from NatPay, specifically delineating, by employer, what portion of the funds seized by Pioneer Bank and/or Pioneer Bancorp were trust fund taxes that were intended to be paid to the IRS.

B. The Court enter judgment in favor of plaintiff United States of America and against defendants Pioneer Bank and Pioneer Bancorp, in the amount of any funds determined to have been subject to the § 7501 trust in favor of the United States, plus interest computed from the date on which the funds should have been transferred to the IRS;

C. The Court enter judgment in favor of plaintiff United States of America and against defendants Pioneer Bank and Pioneer Bancorp, in the amount of any payroll taxes seized by such Defendants that were not subject to the § 7501 trust in favor of the United States, plus interest computed from the date on which the funds should have been transferred to the IRS; and

D. The United States of America shall recover its costs, and be awarded such other and further relief as the Court determines is just and proper.

Respectfully submitted,

RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General

/s/ Bradley A. Sarnell

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CIVIL COVER SHEET

1:20-CV-487

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

United States of America

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Bradley A. Sarnell, U.S. Department of Justice
PO Box 55, Washington DC 20044
(202) 307-1038**DEFENDANTS**

Pioneer Bank, Pioneer Bancorp, Inc., and Cloud Payroll, LLC,

County of Residence of First Listed Defendant Albany
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- | | |
|---|--|
| <input checked="" type="checkbox"/> 1 U.S. Government Plaintiff | <input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party) |
| <input type="checkbox"/> 2 U.S. Government Defendant | <input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III) |

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	1	1	Incorporated or Principal Place of Business In This State	4	4
Citizen of Another State	2	2	Incorporated and Principal Place of Business In Another State	5	5
Citizen or Subject of a Foreign Country	3	3	Foreign Nation	6	6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/ Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR	SOCIAL SECURITY
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/ Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities Employment <input type="checkbox"/> 446 Amer. w/Disabilities Other <input type="checkbox"/> 448 Education	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other Employment <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))
			FEDERAL TAX SUITS	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609
			IMMIGRATION	<input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee (Prisoner Petition) <input type="checkbox"/> 465 Other Immigration Actions

V. ORIGIN (Place an "X" in One Box Only)

- | | | | | | |
|---|---|--|---|--|---|
| <input checked="" type="checkbox"/> 1 Original Proceeding | <input type="checkbox"/> 2 Removed from State Court | <input type="checkbox"/> 3 Remanded from Appellate Court | <input type="checkbox"/> 4 Reinstated or Reopened | <input type="checkbox"/> 5 Transferred from Another District | <input type="checkbox"/> 6 Multidistrict Litigation (specify) |
|---|---|--|---|--|---|

VI. CAUSE OF ACTION (Enter U.S. Civil Statute under which you are filing and write a brief statement of cause.)

26 USC 7402- turnover of tax deposits

VII. Previous Bankruptcy Matters (For nature of suit 422 and 423, enter the case number and judge for any associated bankruptcy matter previously adjudicated by a judge of this Court. Use a separate attachment if necessary.)**VIII. REQUESTED IN COMPLAINT:** CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.**DEMAND \$**

7,270.458.70

CHECK YES only if demanded in complaint:

JURY DEMAND: Yes No**IX. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

X. This case (check one box) Is not a refile of a previously dismissed action

is a refile of case number

previously dismissed by Judge

DATE April 30, 2020

SIGNATURE OF ATTORNEY OF RECORD

/s/Bradley A. Sarnell

Fee Waived.

District Judge: DNH
Magistrate Judge: DJS